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Regulation: 31 CFR Part 501
Comments:

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Via Electronic Mail and U.S. Mail

March 31, 2003

Chief of Records
ATTN Request for Comments
Office of Foreign Assets Control
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Re: Publication of Economic Sanctions Enforcement Guidelines,
Appendix to 31 CFR Part 501

Ladies and Gentlemen:

Katten Muchin Zavis Rosenman ("KMZR") appreciates the opportunity to comment on the updated version of the Office of Foreign Assets Control ("OFAC") internal Economic Sanctions Enforcement Guidelines (the "Guidelines"). In light of the increased scrutiny of international transactions following the tragic events of September 11, 2001, we commend OFAC's efforts to provide guidance on and promote consistency in the application of its enforcement practices.

I. License Suspension and Revocation; Cautionary and Warning Letters

With respect to II.A.1-5, we request that a consistent standard of intent based on knowledge be established for violations resulting in

license suspension or revocation. For purposes of II.A.1, the party should be required to have knowledge that a statement was false or misleading. In II.A.4, the party should be required to have knowingly counseled, commanded, induced or procured the violation.

With respect to II.A.5, we request examples of the types of acts or omissions that OFAC contemplates would demonstrate unfitness to conduct transactions authorized by a general or specific license.

We request a careful review of the use of the terms "bank" and "financial institution" to clarify the application of the Guidelines to such persons. The terms "bank" and "financial institution" may be interpreted differently depending on the specific statutory or regulatory context in which the terms are used. For instance, under Title 31 of the Code of Federal Regulations, the term "financial institution" is defined to include a non-bank money transmitter as well as other types of money services businesses. See 31 C.F.R. 103.11(n) and (uu).

With respect to II.C.1, we request clarification on the definition of the term "financial transfers" and whether it means the same thing as "international funds transfers processed within the U.S. banking system". Additionally, we seek guidance on whether the term is intended to include transactions involving "financial institutions" other than banks, such as non-bank money transmitters and other persons involved in non-bank funds transfer operations such as persons operating alternative remittance systems (e.g hawalas).

We request clarification of the term "shortly" with respect to transactions that take place after a new designation has been made for purposes of II.C.1(e).

With respect to II.C.1(f), we recommend that a de minimis amount be established for transactions determined to be of such "low value" that the cost of pursuing a penalty action would likely exceed the enforcement benefits. In addition, we seek clarification on whether such a de minimis standard would apply to each separate transaction or to multiple transactions, in the aggregate considered in one action. Establishing such a de minimis standard would be consistent with the language in II.C.2 under which warning letters will be issued for export and import violations of \$500 or less.

II. Civil Penalties

A. With respect to III.A.6(a), we request clarification on what is contemplated by "failure to respond" to a request to furnish information.. Specifically, does the phrase mean refusal to respond, or would it also encompass an incomplete response, acknowledging the request, but seeking additional clarification in order to provide a complete response?

B. Evaluation of Mitigating and Aggravating Factors

Mitigating Factors. The Guidelines indicate that the history of mitigation with respect to cases having substantially identical fact patterns generally will govern the degree of mitigation to be applied

in all subsequent cases. We respectfully request that case studies be made publicly available to provide guidance for settlement negotiations.

The Guidelines make a distinction between funds transfer violations by banks or other financial institutions versus all other instances for purposes of mitigating penalties. We seek clarification of the reasoning behind the distinction which appears to be difficult to reconcile with the Voluntary Disclosure and First Offense provisions set forth in III.B.3 and 4 respectively.

The Guidelines set forth a list of fifteen typical mitigating factors with respect to which we seek additional clarification. We request that the following terms be defined or clarified:

- "First offense", for purposes of III.B.1.(b)
- "Other remedial measures taken", for purposes of III.B.1(e)
- "Useful enforcement information, for purposes of III.B.1(g)
- "U.S. Government enforcement action" and "completed", for purposes of III.B.1(i).

We also request clarification with respect to what OFAC contemplates by "lack of relevant commercial experience" in III.B.1 (j). It is unclear whether this factor is intended to apply only to individuals with little or no business experience or on a broader basis. We further request that examples be provided with respect to III.B.1(m) on what constitutes a language barrier or other impediment to understanding the regulations.

We also recommend that an additional mitigating factor be added to provide that a good faith effort to ensure a person is not on the OFAC SDN list should be taken into consideration when an institution nonetheless unwittingly conducts a transaction with a party not on the list but associated with someone on the list (e.g., a spouse with a different last name).

Finally, we note that one of the most troublesome aspects in interpreting OFAC administered regulations and Executive Orders is determining the threshold levels of what constitutes ownership or control of a person. A good faith effort to do so in reliance upon well established methodologies used in banking or another appropriate federal regulatory scheme should be considered a mitigating factor for purposes of these Guidelines.

Aggravating Factors. Under the list of typical aggravating factors, it would be helpful once again to define what an "offense" is in III.B.2(b).and distinguish it from an actual violation. Also, please clarify what is meant by "prior notice from U.S. government" for purposes of III.B.2(c), and the term "notice" in III.B.2(d). It is also unclear what OFAC contemplates when referring to "extraordinary economic sanctions impact" and "familiarity with the economic sanctions programs" in III.B.2(f) and (h), respectively.

Voluntary Disclosure and First Offense. We request clarification of the meaning of each of the terms, "apparent violation(s)" and "possible sanctions violation(s)." Both terms appear to be used in reference to transactions conducted by a person, the "actor," in possible violation of OFAC rules but before the issuance of a penalty notice and OFAC's

determination of an actual "violation". The context suggests the following meanings:

- "Apparent violation(s)" - a term used by OFAC to refer to a transaction(s) conducted by the "actor" in possible violation of one or more OFAC rules at a point in time at which OFAC has obtained knowledge, having received notice either from the "actor" or notice from some other source, but before issuance of a final penalty notice (i.e. before OFAC determination that an actual "violation" has occurred).
- "Possible sanctions violation(s)" - a term used from the perspective of the "actor" when reporting to OFAC a transaction conducted by the actor that the actor has identified as a possible violation of OFAC rules. It is unclear whether the term is used only in reference to transactions reported to OFAC by the actor prior to OFAC having received notice from some other source.

The first sentences of the sections Voluntary Disclosure and First Offense, when read together, suggest the conclusion that when both factors are present, Voluntary Disclosure will generally result in a 50% reduction of the amount of penalty that otherwise would be proposed under these Guidelines and First Offense will result in an additional 25% reduction in the amount that otherwise would be proposed under these Guidelines. However, this conclusion appears to be in direct conflict with the preceding discussion under Subsection 1 -Mitigation and mitigating factors, where in "the case of funds transfer violations by banks or other financial institutions...penalties generally will be mitigated between 25-50%." The Guideline text should be revised to clarify this matter.

The discussion regarding a first or subsequent offense appears to suggest that a "prior OFAC penalty case that ended in an assessed civil monetary penalty" constitutes a prior offense while a prior OFAC penalty case that settled without an assessment of a civil monetary penalty does not constitute a prior offense. The unstated reasoning appears to be that with the assessment of a civil money penalty, OFAC makes a type of formal determination, in the nature of a regulatory adjudication, that a violation has occurred and, that in the absence of such "adjudication," no violation can be said to have occurred. As the reference to the distinction between prior OFAC penalty cases "settled" and those in which penalties were assessed is open to varying interpretations, we suggest defining the term "offense" and clarifying the discussion.

III. Settlement Prior to Issuance of Prepenalty Notice

A. Initiating Settlement

The Initiating Settlement discussion states that prior to issuance of a prepenalty notice, a party may request an informal settlement. Use of the term "informal" suggests that at some point in time ---another point in time not specifically stated--- settlement negotiations become "formal." The distinction, if any, between an "informal" settlement and a "formal" settlement, and the corresponding negotiations as well as any attendant legal repercussions should be clearly stated.

The discussion suggests that the time for "informal" settlement negotiation is limited to 60 days. If such a time period limit exists, it should be clearly noted.

The discussion does not make clear what constitutes the "issuance" of a prepenalty notice. Does issuance mean the date the notice is mailed by OFAC to the party in question, the date the notice is signed by an OFAC representative, or the date that the notice is received by the party to which the notice is addressed. Since issuance of the prepenalty notice has specific repercussions, we suggest the term be defined.

B. Settlements of Multiple Violations

The reference to "multiple apparent violations" in this paragraph is ambiguous in that the term could mean multiple violations by the same party or multiple apparent violations by multiple parties where the underlying transactions are related to the transaction conducted by the party negotiating settlement. We suggest the discussion be revised to clarify the meaning intended by OFAC.

IV. Settlement Following Issuance of Prepenalty Notice

The reference to "multiple apparent violations" in this paragraph is ambiguous in that the term could mean multiple violations by the same party or multiple apparent violations by multiple parties where the underlying transactions are related to the transaction conducted by the party negotiating settlement. We suggest the discussion be revised to clarify the meaning intended by OFAC.

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KMZR appreciates the opportunity to comment on the revised Guidelines and OFAC's consideration of our requests for clarification. If you have any questions, please contact Carol Van Cleef, Patrice Motz or Alexi von Keszycski at 202-625-3730 or at carol.vancleef@kmzr.com

Sincerely,